Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35768
Docket No. CL-35743
01-3-99-3-727

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Delaware and Hudson Railway Company, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12475) that:

(1) I (Valerie A. S. Tyler) am requesting a full day's pay for work being performed by Yardmaster B. Federico on July 21, 1998 at 1135 hours that was in violation of the Clerks' Scope of duties, while a clerk was on duty.

(2) Work done by B. Federico, DSPO of cars normally to be done by clerks."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

On date of claim, a Yardmaster found it necessary to "dispo" a car because he apparently was unable to contact the Minneapolis office where such work is performed by a clerical employee. The Organization contends the work performed by the Yardmaster is reserved to the clerical craft, and should have been performed by the Claimant, rather than an employee not covered by the Agreement.

The Carrier first asserts the work was merely incidental to the Yardmaster's duties. We do not agree with this position. The Carrier acknowledges that this work belongs to clerical employees in the CATS department in Minneapolis. It explains, "It is only on the odd occasion when the EDI system does not perform this function properly, and the Yardmaster subsequently cannot reach Minneapolis to perform this function in order to timely switch a track, that the Yardmaster will dispo the odd car." The Carrier insists these are isolated instances. Based upon such an assertion, the Board concludes this is work that is not normally performed by the Yardmaster, and is not incidental to his other duties. It is evident the only reason the Yardmaster performed the work was because he could not reach the proper employee and wanted to expedite the movement.

Next, the Carrier argues the Claimant would not have performed this work inasmuch as she works at Binghamton, and the work would have been performed by Minneapolis Clerks. The Organization, however, insists Binghamton employees perform this work as backup to the employees at Minneapolis. The Carrier does not refute this assertion.

Based upon the record before it, the Board concludes the Agreement was violated when someone other than an employee covered by the Agreement performed the work in question. The magnitude of the violation, however, does not warrant the remedy sought. Accordingly, the Carrier is directed to compensate the Claimant one hour's pay. In doing so, the Board rejects the Carrier's argument that any violation of the Agreement was merely de minimis, and not worthy of a remedy. If this were a one-time event, the Board might agree that the small amount of work performed by the Yardmaster was not enough to have an effect on the bargaining unit. The record shows, however, that there has been a pattern of such violations whenever the Clerks at Minneapolis cannot be reached. Such a pattern could have the long-term effect of eroding the work out of the bargaining unit. A remedy, therefore, is not inappropriate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of October, 2001.

CARRIER MEMBERS' DISSENT
TO THIRD DIVISION AWARD 35768
DOCKET 35743
(Referee Simon)

The issue in this case is whether the Carrier violated the Agreement when a yardmaster made a telephone call for the purpose of dispoing a car that needed to be switched. Such activity is usually performed automatically through the EDI system but for some reason the system did not provide for the disposition of the car. The Organization contends that clerks have normally dispoed cars and should have done so in this case. In support of its position, the Organization refers to Rule 1 (b) of the Agreement which contains the usual language creating what is known as a "position and work" scope rule.

The Carrier has several defenses. First, the Carrier points out that immediately following Rule 1 (b) is Rule 1 (c) and the latter Rule contains language which limits the coverage of Rule 1 (b). Thus, Rule 1 (c) provides:

> "Clerical duties covered by this Rule which are incidental to the primary duties of an employee not covered by this Agreement, may be performed by such employee provided the performance of such duties does not involve the preponderance of the duties of the other employees not covered by the agreement."

As noted by the Carrier, the primary responsibility of the yardmaster is to switch tracks in a timely fashion and it is only in the rare instance, when the EDI system does not perform its function, that the yardmaster must make a phone call lasting a few seconds, to dispo the car. The interplay between Rules 1 (b) and 1 (c) in general and particularly between the clerical and yardmaster crafts has been subject to several Awards on this property. See Third Division Awards: 31648, 30918, 33455, all of which involved the interpretation of the two Carrier Rules. Indeed, Award 31648 involved a claim that a yardmaster was performing the work of a clerk. In addition to the Awards cited by the Carrier, there is a recent Award on the property involving these parties and issue. Third Division Award: 33644 involved a contention that the Carrier had transferred work from a clerk to a yardmaster in violation of Rule 1 (b). While the Board held that the claim must fail because the Organization had failed to identify the specific duties allegedly transferred, the Board nonetheless added:

> "Thus, if some of the duties were, in fact, assigned to Yardmaster Longtin as the Organization contends, it would appear that they were incidental to Yardmaster's Longtin's primary duties and they did not involve the

preponderance of his duties. Accordingly, such an assignment was permissible under Rule 1(c)."

Indeed, the only case in recent memory in which the Organization's claim was upheld was Third Division Award 33444, in which the Board found that more than 12 separate tasks taking at least 3 hours per day had been transferred from clerks to the yardmaster. Even here, the Board was constrained to note:

> "Last the Board finds that a small quantum, about one hour of clerical work formerly performed by the first shift Train Clerk, can be performed by the Yardmaster pursuant to Rule 1 (c) because the clerical work is incidental to the primary duties of the Yardmaster."

In summary, all prior Awards on this property involving these parties and this issue support the Carrier's right to a denial award.

In addition to the above, the Carrier pointed out that even if 1 (c) had never existed the claim would have to be dismissed under the doctrine of de minimus. As noted by the Carrier the "work" takes 10 to 15 seconds and that all the claims filed by the Organization cover a period of 88 days and only 30 dispos.

Lastly, the Carrier points out that the clerical work involved is not performed at the Claimant's location at Saratoga, New York, but in Minneapolis, Minnesota. Thus even if the Agreement were violated there was no basis for relief to be granted to a clerk not even remotely connected to the work claimed.

Notwithstanding all the above, the claim was sustained. Clearly, this Award is not consistent with the overwhelming weight of arbitral authority to the contrary and cannot serve as a precedent.

Martin W. Fingerhut
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Michael C. Lesnik
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